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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 463

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees,

and

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION, AUTOMOBILE SHIPPERS, INCORPORATED, COMMERCIAL CARRIERS, INCORPORATED,

Intervening Appellees.

APPELLANT'S BRIEF OPPOSING THE MOTIONS TO DISMISS OR AFFIRM.

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ARGUMENT.

The United States and the Interstate Commerce Commission, appellees here, urge upon this Court a proposition which if adopted would confer upon the Commission an arbitrary power to condemn reduced rates proposed by a carrier. Thus, they contend (p. 4) "that the evaluation of cost studies is a matter peculiarly within the competence of the expert administrative body." In other words, they contend that the courts should not in such cases test the Commission's ultimate conclusion that the

carrier has failed to show that its proposed rate is compensatory by application of the well-established rule of judicial review that the conclusion must be supported by a rational basis. We submit that for this Court to accept as valid the proposition urged by the United States and the Commission would delineate an area within which the Commission could condemn rates arbitrarily and capriciously, something it can not lawfully do in other fields, and effectively deprive a carrier of its right to initiate competitive rates. As we have shown (Jurisdictional Statement, pp. 6-11, incl.), the grounds assigned by the Commission for condemning appellant's proposed rate lack the required rational basis and hence, what the Commission has attempted to do in this case provides an illustration of arbitrary and capricious action with which the Commission could condemn other rates if such conclusions are held to be beyond judicial review.

Nor is there any merit in the contention made by the United States and the Commission that the appellant lacks standing here because it failed to remedy the asserted defects in its cost studies offered in support of its rate. Obviously, for the appellant to have undertaken to "correct" the alleged deficiencies in its cost studies would have been for appellant to concede the invalidity of the theory of its case.

The intervening defendants, also appellees here, urge upon this Court a proposition which we believe is equally unsound, and one which permeated the District Court's decision.[1] Their contention is that even if the grounds assigned by the Commission for condemning the appellant's proposed rate are unsound, the rate should be condemned because concededly the appellant did not un-

[1] The decision of the District Court, unpublished at the date of filing of appellant's Jurisdictional Statement, now appears in 107 F. Supp. 118.

dertake to show that the proposed rate would be compensatory on a fully distributed cost basis; in other words, that a proposed rate must be shown to cover fully distributed costs if its validity is to be sustained.

This proposition, if sustained by this Court, would make subject to cancellation a large proportion of the rates published by railroads, probably not less than one-third of all rates. Appellant has shown in its Jurisdictional Statement (pp. 5-6, 11-13, incl.) that the added traffic theory of rate making is a valid one which has long been recognized by the Commission, and has been sanctioned by the Supreme Court of California in *Lang* v. *Railroad Commission of California*, 2 Cal. 2d 550, 42 P. 2d 639.

The fallacy of the intervening appellee's arguments and of the Commission's and the Court's rejection of the appellant's rate is made clear by Professor Locklin of the University of Illinois, who states:[2]

> • • • If a particular unit of traffic will not move unless charged a low rate, it is profitable for the railroad to quote a low rate provided the variable or "out-of-pocket expenses" are covered. If the railroad can get something over the variable expense this item of traffic is profitable. It covers the extra expense incurred in taking the traffic, and it makes some contribution to the overhead expenses which must be incurred anyway. If the railroad attempted to charge a normal rate the traffic would not move.

Further, Professor Locklin states:[3]

> Of course it is true that if some traffic is carried at less than average cost, some must be charged more than average cost. But the implication that

[2] Locklin, D. Phillip, Economics of Transportation (Chicago, Richard D. Irwin, Inc., 1951), pages 138-139.

[3] Op. cit., p. 155.

the low rates on some traffic mean that other traffic must be charged more than it otherwise would have been is entirely erroneous. If the distinction between constant and variable expenses has been fully grasped, it will be apparent that preferential rates relieve rather than increase the burden on other traffic if two conditions are fulfilled. These are that the rate must more than cover the direct costs; and that the traffic will not move at higher rates. When these conditions are fulfilled, preferential rates are of benefit to all concerned.

Professor Locklin, in his discussion of Constant and Variable Expenses,[4] makes it clear that the many items spoken of by the intervening appellees (pp. 5-6) as necessary to be taken into account, are not, in fact, variable expenses when considered in the light of the movement here involved but are properly considered as fixed expenses.

It follows that the Commission erred in holding that the failure of the appellant to introduce evidence as to such items invalidated its cost studies. The District Court erred in approving the Commission's holding.

Both appellees (p. 3) and intervening appellees (pp. 6-7) criticized appellant's reliance on the representations of Chrysler officials that the 41-cent rate was the highest rate which could be charged by appellant which would move any traffic. Evidence was admitted into the record which showed that in other instances Chrysler had used rail service where there was a smaller differential from the truck rate than the 23-cent differential which would be effective under the 41-cent rate. The Commission erred in relying on evidence of other movements, particularly that derived from earlier reports of the Commission

[4] Op. cit., pp. 134-137.

which dealt with train movements where steam, not diesel engines, supplied the motive power, since the circumstances of such movements obviously were dissimilar and without probative value. The District Court erred in failing so to hold. No more trustworthy evidence than that of the shipper whose traffic was involved could be expected.

The shipper's traffic manager testified that "the minimum differential that would interest us in putting any business on rail would be 23 cents per hundred pounds" (Tr. 57), that is, a rate of 41 cents, which was 23 cents below the motor carrier rate of 64 cents. Since the shipper controls the mode of transportation to be utilized, the shipper's attitude is controlling with respect to the rate needed to enable the appellant to compete with motor carriers for the traffic. Thus, what the shipper has done in other cases and at other times is immaterial. In this case, the appellant had the option of meeting the shipper's terms or of foregoing the traffic. To argue otherwise, as the intervening appellees argue here (pp. 6-7), is to urge a proposition which, if accepted as valid, would result in the motor carriers retaining the traffic indefinitely. In effect, intervening appellees argue that the Commission has the power to veto the exercise of the shipper's managerial discretion, a power nowhere conferred in the Interstate Commerce Act.

CONCLUSION.

We submit that the questions presented by this appeal are substantial; that they are of public importance; and that the Motions to Dismiss or Affirm should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that on this 1st day of December, 1952, I caused copies of the foregoing brief to be served by mail on counsel for all parties of record.

David O. Mathews

DAVID O. MATHEWS,
Attorney for Appellant.

MOTION TO AFFIRM

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF INDIANA

TERRE HAUTE DIVISION

Civil Action No. 486

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, *Plaintiff-Appellant*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

and

NATIONAL AUTOMOBILE ASSOCIATION, AUTOMOBILE SHIPPERS, INCORPORATED, COMMERCIAL CARRIERS, INCORPORATED, *Intervening Defendants-Appellees.*

MOTION TO AFFIRM

Appellees United States and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the district court be affirmed.

This is a direct appeal from the final decree of a specially constituted district court of three judges, convened pursuant to 28 U.S.C. 2284, dismissing appellant's complaint seeking to set aside certain orders [1] of the Commission. The decree was entered on August 27, 1952, appeal was allowed on October 24, 1952, and appeal papers were served on October 27, 1952.

The Commission's orders, entered in proceedings under Section 15(7),[2] required the appellant to cancel a rate of 41 cents per hundred pounds on automobiles in car loads (and automobile parts in mixed car loads with automobiles) carried from Evansville, Indiana to St. Louis, Missouri.[3] The

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[1] Orders dated September 21, October 23, December 3 and December 20, 1951 under Investigation and Suspension Docket No. 5782, Automobiles, Evansville, Ind., to Missouri; Fourth Section Application No. 25318, Automobiles from Evansville, Ind., to Southwest; and Fourth Section Application No. 25439, Automobiles from Evansville, Ind., to St. Louis, Mo. The Commission's original report appears at 283 I.C.C. 135. This report is incorporated by reference in the Order of September 21, 1951.

[2] 49 U.S.C. 15(7). Pertinent provisions of the statute are set forth in "Appendix B" to the "Statement as to Jurisdiction."

[3] Appellant filed schedules proposing that the 41 cent rate be made effective April 13, 1950. Upon filing of protests by two interested motor carriers and an association of motor carriers (appellees here), the proposed rate was ordered suspended and the matter set down for hearing. The statutory period of suspension (7 months) expired prior to conclusion of the proceeding, and, after one voluntary suspension, appellant refused to suspend further. The rate became effective on March 12, 1951 and remained in force until cancelled shortly after the decision of the district court was entered.

Commission's action was voluntarily held in abeyance pending decision of the district court. The rate has since been cancelled.

The Commission, in ordering the cancellation, held (1) that the appellant had failed to show that the proposed rate was compensatory, because its cost studies were defective in numerous particulars and lacked probative value, and (2) that appellant had failed to establish that a rate so low was necessary to attract the traffic. The Commission accordingly concluded that appellant had failed to sustain its burden of proof, as specifically required by Section 15(7) of the Act, and that "the reduced rate under investigation has not been shown to be just and reasonable". 283 I.C.C. 141. The district court sustained the Commission's orders in a lengthy and carefully considered opinion.

The background of the rate reduction is as follows. Chrysler Corporation established a Plymouth automobile assembly plant at Evansville, Indiana in 1935. Promptly thereafter, it began to ship automobiles to St. Louis, Missouri, by motor carrier, a practice which it continued until February 1940. Thereafter, the traffic was shipped by appellant's rails until automobile production at the plant ceased as a result of World War II. Shipments by rail were resumed when production began again in 1946. In 1947, the traffic was shifted to a motor carrier which was charging a

rate 8 cents above appellant's rate.[4] With minor exceptions, the motor carrier retained the traffic, moving it at a rate of 64 cents per hundred pounds, until appellant's 41 cents rate was put into effect in March 1951, at which time appellant regained the traffic.

Appellant is the only rail carrier which serves Chrysler's Evansville plant directly. It moves traffic obtained from the plant 345 miles to Madison, Illinois, where it turns it over to the Terminal Railroad Association of St. Louis, which delivers it to the St. Louis destination, making a total rail distance of 351 miles. The short rail route between Evansville and St. Louis is that of the Louisville and Nashville Railroad Company, a distance of 168 miles. That company's rate on automobiles is 62 cents per hundred pounds, and it has proposed no change in that rate.

Appellant sought to reduce its rate to 41 cents because its officials were informed by the Chrysler Corporation that, in order to regain the business, it should offer transportation at a rate at least 23 cents below that of the motor carriers. Chrysler explained the asserted need for this differential by claiming that the additional costs of loading and unloading a rail car over and above the cost of motor transportation are 13 cents and 10 cents, respectively.

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[4] As noted *infra*, the automobile shipper's loading costs are substantially less when he uses motor transportation.

At the hearing, appellant introduced certain cost studies which purported to show that the new rate, involving a drastic slash of more than one-third, would still be compensatory. These cost studies were seriously defective, the Commission found, not only because they failed to take into account numerous items of variable costs which would be directly attributable to the new traffic, but, additionally, because they assumed that the fixed expenses in operating trains should all be allocated to other forms of traffic hauled in trains also carrying car loads of automobiles. Experts called by appellees introduced cost figures contradicting data presented by appellant. Based in part upon earlier reports of the Commission, their studies indicated that the new rate would be less than compensatory. Evidence was also introduced to show that, even in the post-war years, carriers by rail had been able to compete successfully with motor carriers where the rate differentials was as little as 10 or 12 cents, and that in the past Chrysler had used this yardstick in determining whether to use rail or motor transportation.

We shall not seek in this motion to set forth the statistical material presented to the Commission or the particular omissions or defects which were found to exist in appellant's cost studies. That information is fully set forth in the Commission's report and has been carefully examined and summarized in the district court's opinion. We would

note, however, that the evaluation of cost studies is a matter peculiarly within the competence of the expert administrative body, and that the district court has found, upon examination of the record, that the Commission has fully performed its functions.

Appellant has suggested that the Commission should have remedied the omissions which were found to characterize appellant's cost studies before reaching any conclusion. But the relevant cost data was within the appellant's possession, and it was plainly appellant's duty to correct its studies. Appellant, however, did not seek opportunity to correct the defects in its presentation, either at the time it filed exceptions to the examiner's report or when it filed its petition for reconsideration. On the record made, the Commission had no choice but to find that appellant had failed to sustain its burden, and that there was insufficient evidence to warrant a determination that the proposed rate was reasonable. Any other finding would have lacked a rational basis.

The issue in this case is thus one of adequacy of proof—whether the carrier met its burden of showing that the proposed rate change had a reasonable factual basis. The Commission found, upon the record, that the carrier had failed to make an adequate showing and had likewise failed to remedy the defects in its presentation. An insistence that the carrier's burden in this matter be fully met is

essential to the achievement of the objectives of the National Transportation Policy: "* * * to provide for fair and impartial regulation of all modes of transportation, * * * to preserve the inherent advantages of each * * * to promote * * * efficient service and foster sound economic conditions in transportation * * * establish * * * reasonable charges * * * without unjust discriminations, undue preferences or advantages or unfair or destructive competitive practices * * *." If a carrier could effect a drastic reduction without showing that its new rate was compensatory, it would be free to institute rate wars for the purpose of destroying its competitors.

CONCLUSION

This appeal presents no substantial question warranting further review by this Court. The decree of the district court should be affirmed.

(Signed) ROBERT L. STERN,
Robert L. Stern,
Acting Solicitor General.

(Signed) EDWARD M. REIDY,
Edward M. Reidy,
Chief Counsel,
Interstate Commerce
Commission.

Certificate of Service

I certify on this 10th day of November, 1952, I caused copies of the above motion to be served, by mail, upon counsel for all parties hereto.

(Signed) RALPH S. SPRITZER,
Ralph S. Spritzer,
Special Assistant to the Attorney General.

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